and surprise in obtaining the said decree and that he might be allowed to prove all such facts and circumstances as would lead to show that the decree of the Twenteth of August, eighteen hundred and fifty five, was obtained by some mistake or surprise. Without ordering proof to be taken in either of the modes asked for by the petitioner, the Court passed an order, on the third of March eighteen hundred and fifty seven, dismissing both of the petitions filed by William Tabler of Lewis. From this order he appealed. It will be seen that the petition seeking to have the decree opened was filed during the same term in which it was passed. Although such is the fact, with the affidavit of the deputy sheriff before us, in regard to the service of the summons we should not deem it proper to open the decree, simply upon the allegations set forth in the petition, in reference to some defect in the service of the summons, and that the decree was passed in consequence of some mistake or surprise, But, in our opinion, there is evidence tending strongly to show there was misapprehension, on the part of the petitioner, which prevented him from appearing and filing an answer to the bill of complaint, and that his failure to appear and answer was not the result of wilful negligence or intentional disobedience, to the command of the process. The bill of complaint was filed upon the same single bill on which a suit at law had been instituted in Frederick County Court, by John A. Castle against Peter Tabler, which suit was entered "settled" in the third of March, eighteen hundred and forty six. The defendant in that suit was then living, according to the statement in the bill, he died in October the Tenth April, eighteen hundred & fifty two, which statement is corroborated by a witness examined on the twelfth of February eighteen hundred and fifty-five; under the commission, who then thought the death was about three years before; For six years, during Peter Tabler's life, after the action at law had been entered settled, the single bill remained unsettled in that case, And not until some months after his decease was it withdrawn; when at the instance of Castle, it was delivered to him, by the Clerk under an order of the Court. Why or for what purpose it was ordered to be delivered, is not disclosed, by anything appearing, in that case, In view of the entry "settled" and the circumstances under which the cause of action was withdrawn, we think the appellant is entitled to relief. And we think so, even conceding (without however, so deciding) that the judgment stated in the appellees Exhibit B; is admissible as evidence. It was only a judgment to bind future assets and inasmuch as the administration account previously passed by the Orphans Court, showed that the executor had only paid the personal estate upwards of $6 00. the aggregate amount of that estate being only $225; it might reasonably be supposed there was very little, if any prospect that the executor would ever have any future personal assets which he would be required to apply to Castles judgment. This being so, with a view of avoiding the expense and trouble of a contested trial at law, the executor might

have consented to give a judgment to bind assets quando accidunt without designing to acknowledge, or supposing he was thereby confessing, and in fact without believing, that the claim had not been fully settled according to the entry in the former suit; Entertaining these views it becomes unnecessary to decide whether the appellants exceptions to the admissibility of the evidence should or should not be sustained. Each party shall pay his own costs in this Court in any event. And before the decree shall be opened the appellant shall pay to the appellee or to his Solicitor, or deposit in the Court below to be paid to the appellee, all his costs which accrued in the said Court, before the filing of the appellants first petition. The said costs to be taxed by the Clerk of that Court. And if such costs in the Court below shall not be paid as above directed, before or within the first four days of the first October Term, after this cause shall be remanded or sent down, by the Clerk of this Court, to the Court below, the said decree shall stand unaffected by any proceedings under the present appeal.

In the event of such payment of costs as will authorize the decree to be opened, then all the costs from and after the filing of the appellants first petition which have accrued, or may accrue in the Court below, are to await the final result or such future order or decree as may be passed in relation thereto, Although the first petition of the appellant was filed during the same term at which the decree was passed, still the petitioner asks to have the enrolment opened; and other proceedings speaks of, or refer to, the enrollment of the decree; It may therefore be proper to remark, that according to the chancery practice in this State, a decree is not considered as enrolled until the end of the term in which it has been passed order reversed and cause remanded for further proceedings.

True Copy
Test
William A. Spencer, Clerk
Court of Appeals of Md.

Thereupon further process, and upon the premises aforesaid, by consent of the said complainant, and defendant, and their Solicitors aforesaid, and by order of the Court here thereon, is further continued, until the third Monday of October next; At which said third Monday, of October, and eighteenth day of the same month, in the year of our Lord one thousand eight hundred and fifty eight; comes again in the said Court here, the said Complainant, and defendant, and their Solicitors aforesaid, and the Judge of the Circuit Court for Frederick County, aforesaid, sitting as a Court of Equity and the said defendant, by his Solicitor aforesaid, filed in Court here the following answer and exhibit thereunto, to wit: